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In The

Supreme Court of the United States

JAIME DURAN FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is indigent and Hispanic. At his trial, the Government used its peremptory challenges to strike all three Hispanic panel members who mathematically could have been empanelled, though they said nothing that could provide a race-neutral basis for doing so. Appointed counsel did not object to this obvious *Batson* violation. Did appointed counsel's failure to object waive petitioner's *Batson* claim, or was it a forfeiture so that the *Batson* issue is reviewable under the plain error standard?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jaime Duran Flores respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the petitioner's conviction is reported at *United States v. Flores*, 286 Fed. Appx. 206 (5th Cir. 2008) (2008 WL 3244071), and appears at Appendix pages ("App. at ___") 1-19.

JURISDICTION

On August 7, 2008, the Fifth Circuit filed its opinion affirming petitioner's conviction. App. at 1-19. On September 9, 2008, the Fifth Circuit denied petitioner's timely petition for rehearing. App. at 21-22. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE AT ISSUE

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Criminal Procedure 52(b) states:

> Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Mr. Flores was convicted of being a felon in possession of a firearm, the predicate felonies having been pleaded to more than ten years prior. He claimed innocence at trial, but challenges only one issue here: the Government's conduct during voir dire.

In the seminal *Batson* decision, this Court extended the Fourteenth Amendment's protections to voir dire, holding that prosecutors cannot use peremptory challenges to strike jurors based on race or

national origin. *Batson v. Kentucky*, 476 U.S. 79 (1986). Here, the Government used its peremptory challenges to strike all panel members with Hispanic surnames who had a mathematical chance of being empanelled. Those panel members said nothing during voir dire, and nothing is contained in the juror identification roster, that differentiated them from non-Hispanic jurors. App. at 23-35.

Mr. Flores's appointed counsel did not object, and on that basis the Fifth Circuit held that Mr. Flores had waived his *Batson* claim. App. at 7-8. In so holding, the Fifth Circuit overturned its own recent precedent finding that a *Batson*-type challenge could be raised on appeal under the plain error standard of Federal Rule of Criminal Procedure 52(b). (App. at 7-8 n.4).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons.

First, the Fifth Circuit's holding that petitioner's *Batson* claim could not be raised on appeal conflicts with the Fifth Circuit's own precedent (which it then overturned in favor of older precedent) as well as the precedent of seven circuit courts (the First, Second, Third, Seventh, Eight, Ninth, and Tenth). Those circuit courts have all found that counsel's failure to object constitutes a forfeiture rather than a waiver, and thus the *Batson* issue can be reviewed under the plain error standard of Rule 52(b). In contrast, three

circuit courts (the Fourth, Sixth, and Eleventh) appear to follow the Fifth Circuit's holding and have found that counsel's failure to object constitutes an unreviewable waiver. A defendant's ability to appeal his conviction should not hinge on geographic happenstance. Accordingly, certiorari should be granted to resolve this split in authority.

Second, Mr. Flores can prevail under the plain error standard. The Government's use of its peremptory challenges to strike all panel members with Hispanic surnames who had a chance of being empanelled is a clear violation of *Batson*. That error affected a substantial right: there is no more fundamental protection to a criminal defendant than the right to a fair jury trial, and a violation of *Batson* impinges on that protection *per se*. Additionally, certiorari is warranted to resolve an apparent split in authority regarding whether demonstrating that a panel member has a Hispanic surname is sufficient to meet the second prong of a *Batson* challenge – an issue critical to determining whether a Hispanic defendant could ever prevail under the plain error (or any other) standard.

Third, this is an important question of law likely to be encountered again. That this Court continues to find *Batson* violations demonstrates that prosecutors continue to exclude minority panel members without race-neutral bases. As a percentage of the population, minorities are disproportionately the subject of criminal prosecutions, indigent, and represented by appointed counsel. As well, the population of this

country is increasingly "minority," especially Hispanic. Indigent minority defendants are exactly those who should be protected by *Batson*, but who, like Mr. Flores, are likely to be subject to the improper use of peremptory challenges. The Fourteenth Amendment and *Batson* will be of little use to minority defendants if their appointed counsel's failure to enforce those rights constitutes a waiver that cannot be reviewed under Rule 52(b). Certiorari is warranted to resolve these issues not just for Mr. Flores, but for all minority defendants and panel members.

I. THE GOVERNMENT STRUCK ALL PANEL MEMBERS WITH HISPANIC SURNAMES WHO COULD HAVE BEEN EMPANELLED

Mr. Flores is Hispanic.[1] There were 44 panel members, numbered 1 through 44, and the 12 with the lowest numbers after strikes would be empanelled.

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[1] He was identified as such in court documents, and Flores is the 13th most frequently occurring Hispanic surname. *See* David L. Word & R. Colby Perkins Jr., *Building a Spanish Surname List for the 1990s – A New Approach to an Old Problem*, POPULATION DIV. WORKING PAPER SERIES, Technical Working Paper No. 13 (Population Div., U.S. Bureau of the Census, Washington, D.C.) (March 1996), at 20, available at http://www.census.biz/population/documentation/twpno13.pdf (ranking 639 "most frequently occurring heavily Hispanic surnames"). This Court has previously relied on Census Bureau statistics to demonstrate that a surname was Hispanic. *See Castaneda v. Partida*, 430 U.S. 482, 486, 486 n.5 (1977).

App. at 23-35, 37. The Government struck seven jurors via peremptory challenges following a voir dire during which it asked no questions. App. at 36. Of the seven struck by the Government, three had definitive Hispanic surnames: Mondragon (#6), Zarate (#22), and Urias (#28). App. at 36.[2] These were the first three jurors with Hispanic surnames, and the next (Gomez – #33) had no mathematical chance of being empanelled. App. at 32. Assuming the Government had used all of its peremptory challenges but not on the Hispanic panel members, Mondragon, Zarate, and Urias all would have been in the top 12. App. at 23-37. The population of Midland County, where Mr. Flores was convicted, is over one-third Hispanic.[3] No panel member with a Hispanic surname sat on the jury that ultimately convicted Mr. Flores. App. at 37.

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[2] *See* Word, supra n.1, at 21, wherein Mondragon, Urias, and Zarate also appear in the list of the "most frequently occurring heavily Hispanic surnames."

[3] *See* U.S. Census Bureau: State and County QuickFacts, http://www.quickfacts.census.gov/qfd/states/48/48329.html (stating that in 2006, "Persons of Hispanic or Latino origin" comprised 34.9 percent of the population of Midland County, Texas).

II. CIRCUIT COURTS ARE SPLIT ON WHETHER DEFENDANTS MAY BRING A *BATSON* CHALLENGE ON APPEAL UNDER RULE 52(B), WITH THE MAJORITY FINDING, CONTRARY TO THE FIFTH CIRCUIT, THAT THEY MAY

Seven Circuit Courts (the First, Second, Third, Seventh, Eight, Ninth, and Tenth) have held that a *Batson* challenge can be raised for the first time on appeal under the plain error standard. *See United States v. Willis*, 523 F.3d 762, 767 (7th Cir. 2008); *United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) ("A majority of other circuits, however, review untimely *Batson* objections for plain error"); *Hidalgo v. Fagen*, 206 F.3d 1013, 1019-20 (10th Cir. 2000); *United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996); *United States v. Chandler*, 12 F.3d 1427, 1432 (7th Cir. 1994); *United States v. Pulgarin*, 955 F.2d 1, 2 (1st Cir. 1992); *United States v. Bedonie*, 913 F.2d 782, 794 (10th Cir. 1990); *United States v. Dobynes*, 905 F.2d 1192, 1197 (8th Cir. 1990); *Gov't of Virgin Islands v. Forte*, 806 F.2d 73, 76 (3d Cir. 1986). Indeed, in the Second Circuit's *Brown* decision, the Government *agreed* that the plain error standard applied to untimely *Batson* claims. *See Brown*, 352 F.3d at 663 ("The government agrees that plain error review is proper here, thereby relinquishing the argument that Brown has waived, as opposed to forfeited, her objection.").

These circuit courts all found that the failure of trial counsel to object constituted a forfeiture rather than a waiver, and accordingly an untimely *Batson* challenge was reviewable under Rule 52(b). Indeed, the Fifth Circuit previously had also so held when reviewing a gender-based challenge brought for the first time on appeal. *See United States v. Parsee*, 178 F.3d 374, 378 (5th Cir. 1999) ("For the first time on appeal, appellants urge that the government impermissibly excluded a juror on the basis of her gender. . . . We may now reverse only if plain error was committed[.]"). The Fifth Circuit overturned *Parsee* in its opinion below. *See* App. at 7-8 n.4.

In contrast, three other circuit courts (the Fourth, Sixth, and Eleventh) appear to follow the Fifth Circuit's holding below that a *Batson* challenge is not reviewable under Rule 52(b). *See Anderson v. Fed. Express Corp.*, No. 96-6723, 145 F.3d 1329, 1998 WL 246456, at *1 (6th Cir. May 5, 1998); *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997); *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992). Accordingly, the circuit courts are split (as is the Government) on the question presented.[4]

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[4] State courts also have split on this important constitutional issue. At least five allow appellate review under a standard equivalent or similar to Rule 52(b). *See, e.g.*, *State v. Were*, 890 N.E.2d 263, 278-79 (Ohio 2008); *McGee v. State*, 953 So.2d 211, 214 (Miss. 2007); *State v. Nordlund*, No. 26859-1-II, 2002 WL 31081997, at *3 n.9 (Wash. Ct. App. Sept. 13, 2002);

(Continued on following page)

III. MR. FLORES CAN MEET THE REQUIREMENTS OF RULE 52(B), AS COULD OTHER MINORITY DEFENDANTS UNDER SIMILAR FACTS

As this Court observed in *United States v. Frady*, Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly addressed." *United States v. Frady*, 456 U.S. 152, 163 (1982). Based on those two competing interests, this Court said that the Rule was "intended to afford a means for the prompt redress of miscarriages of justice." *Id.* Given the opportunity, Mr. Flores could satisfy the three-prong test for meeting Rule 52(b): (A) there was plain error, (B) regarding a substantial right, (C) that affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Vonn*, 535 U.S. 55, 58, 62-63 (2002).

Rodriguez v. Weber, 617 N.W.2d 132, 141 (S.D. 2000); *Hurts v. Woodis*, 676 So.2d 1166, 1172 (La. Ct. App. 1996). In contrast, at least five have found that the failure to object results in waiver. *See, e.g., Strong v. State*, 263 S.W.3d 636, 646-47 (Mo. 2008); *People v. Rivera*, 810 N.E.2d 129, 136 (Ill. App. Ct. 2004); *State v. Ford*, 39 P.3d 108, 112 (Mont. 2001); *Richardson v. McGriff*, 762 A.2d 48, 63-64 (Md. 2000); *Allen v. State*, 726 S.W.2d 636, 640 (Tex. App. 1987).

A. The exclusion of Hispanic panel members was plain error.

Batson created a three-part test for challenging race-based peremptory challenges: (1) the defendant is a member of a cognizable racial group, (2) the Government exercised peremptory challenges to remove from the jury pool members of the defendant's race, and (3) the existence of such facts and any other relevant circumstances to raise an inference that peremptory challenges were used to exclude panel members based on race. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207 (2008).

First, Census Bureau data demonstrates that Mr. Flores has a definitive Hispanic surname. *See supra* at 5 n.1. Hispanics are considered a cognizable racial group. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 358 (1991); *Castenada*, 430 U.S. at 497 ("[P]ersons with Spanish surnames are readily identifiable.").

Second, the Government exercised its peremptory challenges to strike all three panel members with Hispanic surnames who had a mathematical chance of being empanelled, guaranteeing that no panel members with Hispanic surnames would be seated. *See* App. at 36-37.

Third, the full record will show that the Government asked no questions during voir dire, and there were no answers given to the trial court's questions that would have elicited race-neutral bases for the strikes. The Hispanic and non-Hispanic panel members answered questions during voir dire – which was

comprised of only four questions – consistently: some but not all had previously sat on a jury, some but not all owned firearms, some but not all had worked for the government, and none had any issue with the Midland Police Department. Based on these responses, there were no possible race-neutral bases for striking the Hispanic jurors. *See Snyder*, 128 S. Ct. at 1209-12 (rejecting proffered race-neutral justification where minority panel member's "suspect answer" was also given by non-minority panel members who were not struck); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (rejecting proffered race-neutral justifications where minority and non-minority panel members answered questions consistently but 91% of African American panel members were struck). Accordingly, Mr. Flores can demonstrate a pattern of discrimination evidencing a strong inference of the use of peremptory challenges based on race.

Under these circumstances, the Government could not possibly proffer race-neutral bases for striking all panel members with Hispanic surnames with a chance of being empanelled. And any attempt to articulate non-verbal, race-neutral bases for striking all of the panel members of the defendant's same race would be rejected as a matter of law. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); *Montiel v. City of Los Angeles*, 2 F.3d 335, 340 (9th Cir. 1993) (calling counsel's responses "suspect and pretextual, particularly because all jurors

with Spanish surnames were peremptorily struck from the panel").

Of note, on the appeal below the Government never proffered race-neutral explanations, but rather relied on two arguments: (a) that any *Batson* claim had been waived, and (b) that having a Hispanic surname was not enough to be included as a member of a cognizable racial group.

As to the former, that is the subject of this appeal. As to the latter, this Court and at least two circuit courts have predicated a *Batson* violation based on the exclusion of jurors with "Hispanic surnames." *See Hernandez*, 500 U.S. at 358 (agreeing with lower court's finding that the striking of "the only three prospective jurors with definitive Hispanic surnames . . . made out a prima facie showing of discrimination"); *Castaneda*, 430 U.S. at 495 ("[T]he selection procedure is not racially neutral with respect to Mexican-Americans; Spanish surnames are just as easily identifiable as race was from the questionnaires in Alexander or the notations and card colors in Whitus v. Georgia. . . ."); *Montiel*, 2 F.3d at 340 (discrimination "appear[ed] evident from the defendants' use of five of their seven peremptory challenges to excuse all three prospective jurors with Spanish surnames and two of the three African-Americans"); *United States v. Hernandez-Rodriguez*, No. 93-8142, 16 F.3d 1216, 1994 WL 57674, at *2 (5th Cir. Feb. 17, 1994) (per curiam) ("*Batson* recognized that 'a 'pattern' of strikes against [minority] jurors included in that particular venire might give rise to

an inference of discrimination.' . . . In the instant case, such a pattern existed; every peremptory strike available to the prosecutor was used to exclude jurors with Hispanic surnames.") (quoting *Batson*, 476 U.S. at 97).

In contrast, at least two circuit courts have held that Hispanic surnames cannot serve as a proxy for "actually" being Hispanic. *See United States v. Changco*, 1 F.3d 837, 840 n.1 (10th Cir. 1993) (stating that surnames would not ordinarily suffice for a *Batson* claim because panel members with Hispanic surnames could have obtained those names through marriage or adoption); *United States v. Castro*, No. 91-3144, 965 F.2d 279, 1992 WL 37352, at *3 (10th Cir. Feb. 24, 1992) ("While the arguably Hispanic surname may suggest a plausible inference, and while racial identity may be clear from appearance at voir dire, we cannot sustain a *Batson* challenge on conjecture.") (citing *United States v. Esparsen*, 930 F.2d 1461, 1466-67 (10th Cir. 1991)); *United States v. Campione*, 942 F.2d 429, 433 (7th Cir. 1990) ("Given the examination process available in the selection of a petit jury, the spelling of a person's surname is insufficient – standing alone – to show that he or she belongs to a particular ethnic group.").

The sort of examination contemplated by the Seventh and Tenth Circuits (and advanced by the Fifth Circuit panel in oral argument here) appears to conflict with this Court's statements in *Hernandez* and *Castaneda*. Indeed, such a requirement would be contrary to the very purpose of *Batson* and the

Fourteenth Amendment, requiring an inquiry into the race and national origin of jurors who appear less than (or more than) white or who have non-obviously Anglo surnames. Such an inquiry likely would itself violate the jurors' Fourteenth Amendment rights:

> Q: Mr. Torres, are you Hispanic, or were you adopted by a Hispanic family?
>
> Q: Mrs. Rodriguez, are you Hispanic, or did you marry into a Hispanic family?
>
> Q: Mr. Montanes, you have dark skin, are you Hispanic or are you just very tan?

These illustrations demonstrate the absurdity of adopting a standard requiring a defendant to prove the ethnicity of jurors beyond a showing of surnames that the Census Bureau has identified as being the "most frequently occurring heavily Hispanic surnames." By using Hispanic surnames as a proxy for being Hispanic, Mr. Flores can prevail under a plain error standard. At the very least, certiorari is warranted to address the conflict regarding the standard for satisfying the second prong of the *Batson* analysis for Hispanic defendants. Indeed, this Court could find that striking panel members with Hispanic surnames demonstrates discriminatory intent whether or not they are "actually" Hispanic because such strikes would evidence a belief that they may be more sympathetic to a Hispanic defendant – a clear violation of *Batson*.

B. The Fourteenth Amendment and *Batson* confer substantial rights.

Peremptory challenges normally may be exercised in any way the Government sees fit. The exception in *Batson*, though, "depends on this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter." *Brown v. North Carolina*, 479 U.S. 940, 940 (1986) (O'Connor, J., concurring in denial of writ of certiorari). Indeed, considerations of race in selecting juries "is particularly pernicious because it constitutes a badge of oppression that is unfaithful to the central promise of the Fourteenth Amendment." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986). There can be little doubt that the aims of the Fourteenth Amendment and *Batson* and the rights that they confer are substantial.

C. A *Batson* violation affects the fairness, integrity, and public reputation of the judicial system.

Batson does not protect only the on-trial defendant; instead, it extends to the entire community, and the failure to enforce Batson "undermine[s] public confidence in the fairness of our system of justice." *Johnson v. California*, 545 U.S. 162, 172 (2005) (quoting *Batson*, 476 U.S. at 87). In fact, because of the importance of protecting Fourteenth Amendment rights and the inherent speculation involved in guessing whether a jury with a different racial

makeup would come to a different result, this Court has never required a defendant to demonstrate harm in the *Batson* context. *See, e.g, Batson,* 476 U.S. at 100 (stating that if "the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed"); *see also Snyder*, 128 S. Ct. at 1212 (reversing once defendant established three prongs required by *Batson* and not conducting a harm or prejudice analysis); *Miller-El,* 545 U.S. at 266 (conducting no harm or prejudice analysis after finding *Batson* violation). Accordingly, the substantial right for which petitioner seeks redress *per se* affected the fairness, integrity, and public reputation of his trial.

In short, petitioner can meet the stringent requirements of Rule 52(b). As shown below, he should be given this opportunity.

IV. RULE 52(B) SHOULD APPLY, AND THE IMPORTANCE OF CORRECTING THE ERROR JUSTIFIES THE GRANT OF CERTIORARI

Rule 52(b) is in place for just this sort of situation, where a substantial right was affected but "was not brought to the court's attention." FED. R. CRIM. P. 52(b). Defendants have been allowed to appeal using Rule 52(b) for errors that involved equally or less substantial rights than those at issue here, and there

can be no principled reason for denying review. *See, e.g., Vonn*, 535 U.S. at 74-76 (using Rule 52(b) to analyze error in failing to advise defendant during plea bargain colloquy of his right to counsel should he go to trial when defendant did not object); *United States v. Olano*, 507 U.S. 725, 740 (1993) (using Rule 52(b) to analyze error when trial court allowed alternate jurors to observe deliberations when defendant did not object); *United States v. Young*, 470 U.S. 1, 20 (1985) (utilizing Rule 52(b) to analyze whether conviction should be reversed when prosecutor made improper remarks during closing argument).

Batson and its progeny would be of little or no benefit to an indigent defendant like Mr. Flores, who now stands on the precipice of unknowingly waiving his constitutional rights because his appointed counsel was either unaware of or refused to protect them, or just simply "missed it." Equal protection rights should not be considered waived so expediently.

Other constitutional protections – such as the right to counsel, the right to a jury trial, the right against self-incrimination, and the right to appeal – are explained to the criminal defendant, who then can knowingly waive or enforce those rights. *See Olano*, 507 U.S. at 733 (stating that "a defendant who knowingly and voluntarily pleads guilty . . . cannot have his conviction vacated by court of appeals on the grounds that he ought to have had a trial . . . because the defendant who enters a valid guilty plea waives that right"). Fourteenth Amendment and *Batson* rights, however, are not explained to defendants, and

thus they do not make a knowing and voluntary waiver of those rights. *See id.* (defining waiver as the "intentional relinquishment or abandonment of a known right").[5] This is, at least in part, why the majority of circuit courts are correct in holding that counsel's failure to make a contemporaneous *Batson* challenge constitutes a forfeiture reviewable under Rule 52(b) rather than a waiver.

If, in fact, Mr. Flores has forever waived his Fourteenth Amendment rights because his appointed counsel failed to object in the face of the exclusion of all Hispanic panel members, then *Batson* will have failed precisely those who need it the most. The answer does not lie solely with an ineffective assistance claim; rather, plain error review is warranted on direct appeal, as is allowed in the majority of circuit courts.

Finally, the plain error standard is workable. It has worked in the seven circuit courts (and at least five states) that currently apply it in the *Batson* context. And as demonstrated above, it can work here, where the defendant is Hispanic, where all relevant panel members with Hispanic surnames were struck, and where there were no answers given in voir dire that would differentiate the Hispanic and

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[5] We cannot infer counsel's knowledge to the defendant. Otherwise, all rights would be presumed known, and the failure to object would always be a waiver, rather than a forfeiture, and Rule 52(b) would become superfluous.

non-Hispanic panel members. These issues can only gain importance as the population turns into a minority-majority, and where the Hispanic population is growing swiftly. This issue will arise again, both in state and federal courts, and the Court can resolve two serious circuit splits by granting certiorari and resolving this appeal on the merits. Resolution is not important just to Mr. Flores, but to all minority defendants and panel members and to the system of justice as a whole.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-51138

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
U.S.D.C. No. 7:04-CR-67-4

(Filed Aug. 7, 2008)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Jaime Flores was convicted of being a felon in possession of a firearm in violation of 18 U.S.C.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

§ 922(g)(1). The Government presented circumstantial evidence against Flores, and a jury found him guilty as charged. Flores appeals his conviction and sentence. We hold that the district court committed no error, and we therefore AFFIRM.

I.

Flores was indicted for being a felon in possession of a firearm. The indictment alleged that, having been convicted of a felony, he possessed a firearm on or around February 11, 2004 in Midland, Texas. He pled not guilty and was tried before a jury. The evidence against Flores was, as the Government acknowledged at trial, circumstantial. Most of the facts of the case are undisputed by Flores, except for the ultimate conclusion that he in fact possessed the firearm at issue.[1]

At trial, the Government introduced the testimony of Roy Harrell, the owner of the gun Flores was alleged to have possessed. Harrell testified that, on the evening of February 11, 2004, he placed his pistol on a chair in his den. That evening, he was visited by Kimberly Montgomery and a man she introduced as her brother, Marc. Upon Montgomery's request,

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[1] The Government introduced evidence that the pistol had traveled in interstate commerce and that Flores had been convicted of three felonies. Flores's counsel offered to stipulate to the felonies, but agreed that the Government's witness could testify to the names and dates of the convictions. Flores does not contest these elements of his offense on appeal.

Harrell went outside to inspect Montgomery's car, which had been in a collision. Marc stayed in the den. After his visitors had left, Harrell noticed that the pistol was missing and called the police.

Montgomery testified that, "somewhere around" 7:30 or 8:30 P.M., she traded the firearm to Manuel Antonio Mata, for one hundred dollars' worth of heroin. Montgomery testified that she went to Mata's house, then accompanied him to his vehicle and placed the gun in the vehicle. During the exchange, Mata made a phone call from his cell phone, speaking in Spanish. Phone records show that Mata made a call to the number of Flores's common law wife at 7:19 P.M., around the time Montgomery was with Mata.

Sergeant Mitch Russell testified that he interviewed Montgomery on the day after the theft, February 12. After interviewing her associate Marc, Sergeant Russell spoke to Mata. Russell told Mata that the police needed the gun that had been stolen from Harrell. Russell testified that Mata then made a phone call on his cell phone.[2] Russell could tell that Mata and the male recipient of the call were speaking English and Spanish. Mata's phone records reflect that the call lasted approximately eleven minutes and that the call was made to the number of Flores's common law wife. Sergeant Russell testified that,

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[2] Mata did not testify, and no direct evidence of the content of his phone call was introduced.

immediately after making the outgoing call, Mata went with Officer Debbie Barnes to the Coventry Pointe Apartments to retrieve the pistol. They returned fifteen minutes later with the missing pistol. Russell testified that the Coventry Pointe Apartments were located on a street one to one-and-a-half blocks from Flores's home.

Officer Barnes testified that she assisted Sergeant Russell in locating a missing gun. Barnes testified that, during the investigation on February 12, she observed Mata speaking on his cell phone with a man Barnes understood to know the whereabouts of the gun. Barnes and another officer went to the Coventry Pointe Apartments in Midland to pick up the gun. She and the other officer searched the dumpsters behind the apartments for the missing gun. She was looking in one dumpster and the other officer looked in another. Barnes found the gun in a Toys 'R' Us bag, and ultimately released it to Sergeant Russell. The pistol was found wrapped in a Wendy's bag, inside the Toys 'R' Us bag. The pistol was identified as the one stolen from Roy Harrell.

The Government relied on two items of circumstantial evidence to connect the defendant Flores to the pistol. First, Sergeant Russell identified in Mata's phone records a call placed at 7:19 P.M. on February 11 to a phone number registered to Flores's common law wife and that Flores listed as his own when admitted into jail. Sergeant Russell also identified a call that Mata made to the same number at 11:19 P.M. on February 12, during the time Sergeant

Russell was questioning Mata. He identified the 11:19 call as the call Mata placed immediately before going with officers to retrieve the stolen firearm.

Second, the Government introduced evidence that the Toys 'R' Us bag in which the gun was found also contained a receipt, marked with a time and date corresponding with the time and date of surveillance footage of Flores and a child making a purchase at the Midland Toys 'R' Us.

The Government's theory of the case was that, when Mata called Flores while the police questioned him, Flores told Mata where the pistol was. The Government asked the jury to infer that Flores put the pistol in the dumpster.

Flores testified in his own defense. His attorney asked if he had been in any trouble since he got out of prison after a 1989 felony conviction, and Flores replied that he had not. Flores testified that Mata was his childhood friend, the godson of Flores's own father. Flores testified that he associates with Mata and speaks to him frequently, attempting to get Mata off drugs. Flores also testified that Mata came to his house on or around February 11 or 12 and wanted Flores to purchase a gun. Flores testified that he said to Mata: "I can't possess no guns, to get that gun away from there." He testified that he never saw or handled the gun.

Flores further testified that he had purchased a video game for his grandson at Toys 'R' Us. He testified that the Toys 'R' Us bag in which the pistol was

found had meaning to him because Mata asked him for a bag the day that he came to Flores's house. Flores testified that he spoke with Mata on the phone around 11:00 P.M. on February 12, but that the conversation was about Mata "trying to get a job back with us" at the construction company where Flores worked. He testified that there was no discussion about recovering the gun.

On cross-examination, Flores admitted that he pled no contest and was convicted in 1992 of unlawfully carrying a weapon and evading detention, for which he served one day in jail. He also was convicted in 1993 of possession of marijuana, for which he was given a $250.00 fine. He admitted that the statement that he had been a law-abiding citizen since 1989 was a lie to the jury. Flores also admitted that he was not truthful to his parole boards when he told them that he would not commit any more offenses, but later did.

The jury found Flores guilty of possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Flores within the Sentencing Guidelines range to 86 months of imprisonment.

II.

Flores raises a number of challenges to his conviction. He contends that the prosecution used peremptory challenges to strike Hispanic jurors in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986). Flores also contends that the evidence against him was insufficient to support his conviction. He contends that the

district court erred in admitting testimonial hearsay in violation of Federal Rule of Evidence 802 and also in violation of the Confrontation Clause of the United States Constitution. Flores also contends that his sentence is unreasonable. Finally, Flores contends that he received ineffective assistance of counsel.[3]

III.

A.

Flores contends that the prosecution used its peremptory strikes effectively to exclude all potential jurors with Hispanic last names in violation of the Equal Protection Clause, as explained in *Batson*. Flores did not raise this claim in the district court. We have held that "because a timely objection is an essential prerequisite to a *Batson* claim," a defendant is not entitled to raise a *Batson* claim on appeal if he did not object to the prosecutor's use of peremptory challenges in the district court. *United States v. Pofahl*, 990 F.2d 1456, 1465 (5th Cir. 1993). We have held that a *Batson* challenge must be made before the venire panel is dismissed.[4] *United States v.*

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[3] Flores has expressly abandoned his claims based on *Old Chief v. United States*, 519 U.S. 172 (1997).

[4] *United States v. Parsee*, 178 F.3d 374, 378 (5th Cir. 1999), may be distinguished. In *Parsee*, the defendant made a *Batson* claim on the basis of racial discrimination at the appropriate time. *Id.* On appeal, the defendant raised a gender-based claim, and we stated that we would review the new basis for the *Batson* claim for plain error. *Id.* at 378-79. Here, Flores made no

(Continued on following page)

Abou-Kassem, 78 F.3d 161, 167 (5th Cir. 1996). *See also Thomas v. Moore,* 866 F.2d 803, 805 (5th Cir. 1989) ("A timely objection and the corresponding opportunity to evaluate the circumstances of the jury selection process are essential to a trial court's reasoned application of the limitations placed on peremptory challenges by the *Batson* holding."). In fact, we have held that the trial court should note the untimeliness of a *Batson* challenge made after the venire is dismissed and reject the challenge *sua sponte* if the party opposing the motion does not object. *Garcia v. Excel Corp.,* 102 F.3d 758, 759 (5th Cir. 1997). We will not address this claim raised for the first time on appeal.

B.

Flores contends that the evidence against him is insufficient to support his conviction. He moved for judgment of acquittal at the close of the Government's case and renewed his motion at the end of trial. Because he properly preserved the objection, our review is *de novo. United States v. Williams,* 520 F.3d 414, 420 (5th Cir. 2008). We will affirm if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States*

Batson claim at all in the district court. Moreover, to the extent that *Parsee* is inconsistent with our earlier precedents holding that *Batson* claims may not be heard on appeal if not timely brought, the earlier precedent controls. *See e.g., United States v. Walker,* 302 F.3d 322, 325 (5th Cir. 2002).

v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc). The evidence and all reasonable inferences drawn from it are to be viewed on appeal in the light most favorable to the Government. *Id.* "In addition, all credibility determinations are made in the light most favorable to the verdict." *United States v. Moreno,* 185 F.3d 465, 471 (5th Cir. 1999). "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *United States v. Ortega Reyna,* 148 F.3d 540, 543 (5th Cir. 1998) (citation and internal quotation marks omitted). However, if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," we should reverse because "under these circumstances a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Ramos-Garcia,* 184 F.3d 463, 465 (5th Cir. 1999) (citations and some internal quotation marks omitted).

To establish a violation of § 922(g)(1), the Government has the burden to prove beyond a reasonable doubt: "(1) that the defendant previously had been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce." *United States v. Guidry,* 406 F.3d 314, 318 (5th Cir. 2005). Flores does not dispute on appeal that he had been convicted of a felony or that the firearm at issue traveled in interstate commerce.

His sole challenge is to the sufficiency of the Government's evidence that he possessed a firearm.

Possession may be actual or constructive. *United States v. Munoz,* 150 F.3d 401, 416 (5th Cir. 1998). "Actual possession means the defendant knowingly has direct physical control over a thing at a given time. Constructive possession means ownership, dominion or control over a thing, or control over the premises where the thing is found." *Id.* (citations omitted). Possession may be shown through either direct or circumstantial evidence. *Id.*

In this case, the Government did not attempt to show that Flores had dominion or control over the firearm at issue or controlled the premises where it was found. Instead, it attempted to show, through circumstantial evidence, that Flores actually possessed the firearm at issue and had direct physical control over it at some point on or around February 12. While it is true possession may be proved by circumstantial evidence, that evidence must still be sufficient to support the verdict. We have held, for example, that evidence of a felon's thumb print on a box of ammunition found in his girlfriend's home was insufficient on its own for a reasonable jury to find actual possession. *United States v. De Leon,* 170 F.3d 494, 497 (5th Cir. 1999) (holding nevertheless that the evidence supported a theory of constructive possession).

In this case, the jury was presented with two interpretations of the evidence. The Government's

interpretation was that Mata gave or sold the weapon to Flores, later called Flores to determine where the weapon might be found, and then led police to the dumpster near Flores's home in which Flores had placed the weapon. This interpretation of the evidence is not unreasonable. Thus, there is circumstantial evidence that suggests that Flores possessed the firearm: Mata called Flores in response to the police officers' demand that he, Mata, return the gun; Mata promptly took the police to retrieve it; and the gun was found near Flores's apartment in a bag Flores had recently possessed. Although the circumstantial evidence does not require a conclusion that Flores possessed the gun, we cannot say that it gives equal or nearly equal support to a theory of innocence. Additionally, the jury was entitled to consider and reject Flores's testimony explaining his lack of connection with the gun.

Flores's explanation of the evidence was that he never possessed the weapon. Mata offered it to him, but he refused it. Mata called him while police were questioning him, but the conversation was about Mata trying to get a job at Flores's place of employment. Although the Toys 'R' Us bag was his, Mata had asked for it when he came to Flores's apartment with the gun. Although Flores's version of the story is not directly contradicted by any evidence, in the light of all of the circumstances, it can be seen as less plausible than the Government's interpretation.

Furthermore, Flores's dubious explanation of his phone conversation with Mata can be seen to bolster

the prosecution's theory of the case – especially because it removes from contention other possible explanations for the phone call, for example, that Flores merely knew for some reason where the firearm was, but had never actually possessed it. It is true that we have held that a denial of guilt cannot be treated as evidence of guilt. However, when a defendant goes further than a denial and gives an implausible or controverted alibi or explanation, his testimony may be considered evidence of consciousness of guilt. *See United States v. Sutherland,* 428 F.2d 1152, 1157 (5th Cir. 1970) (holding that the defendant's alibi, rebutted by the Government, could be evidence of guilt); *see also United States v. Hunt,* 129 F.3d 739, 744 (5th Cir. 1997) (acknowledging *Sutherland* rule and holding that denial of use of crack could not lead to inference that defendant intended to distribute crack). Here, the circumstantial evidence against Flores, although not eliminating every hypothesis of innocence, is quite sufficient to allow the jury to make reasonable choices that could support a finding of guilt beyond a reasonable doubt. Furthermore, Flores's testimony could bolster the circumstantial evidence of guilt by excluding some more plausible hypotheses of innocence. Although the evidence against Flores may not suggest only one doubtless and irrefutable conclusion, we review the jury's verdict with great deference and conclude that the evidence is substantial enough to protect a finding of guilt.

C.

We now turn to Flores's arguments under the hearsay rule and the Confrontation Clause. Flores first contends that evidence that Mata made a phone call to Flores and then directed officers to the dumpster containing the firearm was nonverbal assertive conduct. He argues that it permits the inference that Mata told the officers that Flores told him the location of the firearm, and therefore amounts to hearsay evidence.

During the trial, Sergeant Russell was asked what he told Mata when investigating the missing firearm. Russell answered, "That we needed the gun back that had been stolen from Mr. Harrell, that we knew – I knew that he had been involved in it." Flores made an objection to testimony relating anything that Mata had said, and the court sustained the objection. The Government asked what Mata did next. Sergeant Russell testified that Mata made a call from his cell phone. Flores objected to Russell's testimony that Mata spoke in English and Spanish. The objection was overruled. The Government then asked what Mata did immediately after the call, and Russell replied that Mata "[w]ent with Officer Barnes to the Coventry Pointe Apartments to retrieve the pistol." Officer Barnes testified similarly that Mata made a phone call and subsequently assisted her in locating the firearm. The district court sustained Flores's hearsay objection to testimony regarding what Mata said during the phone call. Flores contends that the preceding evidence is identical in

substance to the police officers testifying that "Mr. Mata told me that Mr. Flores said the firearm was in the dumpster."

Flores did not make a hearsay objection to testimony about Mata's nonverbal acts. Therefore, we review for plain error. *See e.g., United States v. Mendoza-Medina,* 346 F.3d 121, 131 (5th Cir. 2003). To establish plain error, Flores must show an error that is clear and obvious and that affected his substantial rights. *United States v. Cisneros-Gutierrez,* 517 F.3d 751, 760 (5th Cir. 2008). We will exercise discretion to correct the forfeited error only "if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hernandez-Martinez,* 485 F.3d 270, 273 (5th Cir. 2007).

Here, Flores has shown no error, plain or otherwise, in the admission of Sergeant Russell's testimony regarding Mata's actions. The Government did not present hearsay evidence. Federal Rule of Evidence 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" under Rule 801(a) is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." We have held that Rule 801 removes implied assertions from the coverage of the hearsay rule. *United States v. Lewis,* 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that the question "Did you get the stuff?" was not a statement and therefore not hearsay).

Here, the Government did not introduce evidence of a "statement" made by Mata, under the meaning of Rule 801. Mata's actions following his phone call were not an assertion or conduct intended as an assertion.[5] Although it may be reasonable to draw the conclusion that Mata learned the location of the firearm from his conversation with Flores, the prosecution did not present evidence that Mata *asserted* this conclusion or intended by his actions to do so. The contested evidence is therefore not hearsay, and Flores has shown no plain error.

Flores also contends that evidence concerning Mata's phone call and subsequent conduct violated the Confrontation Clause, as articulated in *Crawford v. Washington,* 541 U.S. 36 (2004). We review properly preserved Confrontation Clause objections *de novo,* subject to harmless error analysis. *United States v. Pryor,* 483 F.3d 309, 312 (5th Cir. 2007).

Under *Crawford,* testimonial statements of a witness not appearing at trial may not be admitted unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

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[5] This case is therefore unlike cases in which we have held that pointing to or pointing out something can, in some circumstances, be nonverbal hearsay. *See United States v. Caro,* 569 F.2d 411, 417 n.9 (5th Cir. 1978) (holding that pointing out a vehicle containing the defendant's source was assertive conduct); *United States v. Silvas,* No. 92-5586, 1993 WL 261046, at *3 n.2 (5th Cir. June 29, 1993) (unpublished) (holding that pointing to a hole in the ground containing the proceeds of a robbery was a statement for purposes of Rule 801(a)(2)).

541 U.S. at 55-56. In *Crawford,* the Court eschewed a comprehensive definition of "testimonial," but referenced a definition of "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. The Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Id.* at 59 n.9.

Mata's actions – making a phone call to Flores and going with police to retrieve the missing firearm – are not testimonial statements prohibited by the Confrontation Clause. *See United States v. Lopez-Moreno,* 420 F.3d 420, 436 (5th Cir. 2005) (holding that photocopy of an identification card does not qualify as a testimonial statement because it "in no way involves a witness bearing testimony"); *see also United States v. Washington,* 498 F.3d 225, 230 (4th Cir. 2007) (stating that "while the hearsay rules of the Federal Rules of Evidence do not formally demarcate the scope of 'statements' for Confrontation Clause purposes, we take [the definition of statement in Rule 801(a)] to be uncontroversial"). Mata's actions were neither a declaration nor an affirmation and do not resemble a witness bearing testimony. Because his actions are not evidence of assertions made by Mata, they were not introduced for the purpose of establishing the truth of a matter asserted. The district court did not err in allowing evidence of Mata's actions.

Flores also contends, as he did in the district court, that the admission of Mata's cell phone records

showing the numbers called during the dates surrounding the firearm's theft and recovery violates the Confrontation Clause. However, the phone records were business records, which the *Crawford* Court noted are not testimonial in nature. 541 U.S. at 56; *see also Lopez-Moreno,* 420 F.3d at 437 (holding that records from the Bureau of Customs and Immigration's computer system showing dates of deportation were akin to business records and not barred by the Confrontation Clause). Therefore, the admission of the records did not violate Flores's constitutional rights.[6]

D.

Flores contends that his sentence of 86 months of imprisonment is unreasonable. His sentence was in the middle of the Sentencing Guidelines range of 77-96 months. Flores contends that the district court did not consider the nature and characteristics of his offense, as required by 18 U.S.C. § 3553(a). Alternatively, Flores argues that the district court abused its discretion in sentencing him in the middle of the

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[6] Flores argues that the phone records should have been inadmissible on the additional ground that they were subpoenaed after trial exhibits were to be exchanged and not produced until days before trial. Even if the Government had violated the district court's discovery order, this court has held that the district court has broad discretion in responding to discovery abuses. *United States v. Martinez-Perez,* 941 F.2d 295, 302 (5th Cir. 1991). Flores has not shown that the district court abused its discretion here.

Guidelines range, rather than at the lower end. Flores also contends that the district court failed to adequately explain its sentence.

Flores made no objections to his sentence in the district court, so we review for plain error. *See United States v. Molina,* 530 F.3d 326, 329 (5th Cir. 2008). We apply a presumption of reasonableness when reviewing sentences within a properly calculated Guidelines range. *See, e.g., Cisneros-Gutierrez,* 517 F.3d at 766.

In *Rita v. United States,* 127 S.Ct. 2456, 2468 (2007), the Supreme Court stated that consideration of § 3553(a) factors does not always require a lengthy explanation on the record and that, in many cases, the sentencing court may rest its decision upon the Commission's reasoning that the Guidelines sentence adequately accounts for the § 3553(a) factors in the case before him. A lengthier explanation may be required when the defendant makes a reasonable argument against applying the Guidelines sentence. *Id.*

The district court here reviewed the presentence report, found it to be accurate and correct, and adopted its findings and Guidelines calculation. The court noted the sentences imposed on two of the other parties involved, Mata and Montgomery, and judged Flores's sentence to be appropriate. No arguments were made against applying the Guidelines sentence. Flores only requested a sentence at the low end of the Guidelines range because he had turned his life

around since his earlier convictions. We hold that Flores has not overcome the presumption that his sentence within the correct Guidelines range is reasonable and has not demonstrated any plain error in his sentence.

E.

Flores argues that his counsel was ineffective in failing to raise his *Batson* claim and in other respects. We have held that "Sixth Amendment claims of ineffective assistance of counsel should not be litigated on direct appeal, unless they were previously presented to the trial court." *United States v. Aguilar,* 503 F.3d 431, 436 (5th Cir. 2007) (quoting *United States v. Partida,* 385 F.3d 546, 568 (5th Cir. 2004)). We will only consider such claims on direct appeal in rare cases in which the record allows the court to fairly evaluate the merits of the claim. Flores's claim was not presented to the trial court, so we will not consider it on direct appeal.

IV.

For the foregoing reasons, Flores's conviction and sentence are

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51138

D.C. Docket No. 7:04-CR-67-4

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Midland.

(Filed Aug. 7, 2008)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: Sep 17 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51138

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Midland.

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 9, 2008)

(Opinion 8/7/08, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

UNITED STATES DISTRICT COURTS
WESTERN DISTRICT OF TEXAS
JUROR ROSTER
06/07/2004

[USA

vs. [MO-04-CR-067]

Jaime Duran Flores]

~~1)~~ ~~JUROR: KENNETH E DIAMOND~~ ~~JUROR NO: P-05-7 (183)~~

~~OCCUPATION: SECURITY OFFICER~~ ~~701163360~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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2) JUROR: LAURA J LONG JUROR NO: P-05-7 (146)

OCCUPATION: COMPUTER SPECIALIST 701168238

SPOUSE OCCUPATION: NA COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~3)~~ ~~JUROR: MELISSA A PIPPEN~~ ~~JUROR NO: P-05-7 (132)~~

~~OCCUPATION: RECEPTIONIST~~ ~~701171259~~

~~SPOUSE OCCUPATION: ROUTE MANAGER~~ ~~COUNTY: Ector {Cause}~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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4) JUROR: CHRISTOPHER L MUELLER — JUROR NO: P-05-7 (181)

OCCUPATION: ELECTRICIAN — 701170050

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~5) JUROR: THOMAS TODD~~ ~~JUROR NO: P-05-7 (82)~~

~~OCCUPATION: RETIRED CO. COMMISSIONER~~ ~~701174544~~

~~SPOUSE OCCUPATION: WIDOWED~~ ~~COUNTY: Ector [Cause]~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~6) JUROR: MARIA MONDRAGON~~ ~~JUROR NO: P-05-7 (190)~~

~~OCCUPATION: NONE LISTED~~ ~~701173704~~

~~SPOUSE OCCUPATION: UNEMPLOYED PAINTER~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~7)~~ ~~JUROR: VERNON R DAY~~ ~~JUROR NO: P-05-7 (91)~~

~~OCCUPATION: FIELD SPECIALIST~~ ~~701163222~~

~~SPOUSE OCCUPATION: SELF EMPLOYED~~ ~~COUNTY: Upton~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~8)~~ ~~JUROR: DERRICK S BUSH~~ ~~JUROR NO: P-05-7 (171)~~

~~OCCUPATION: SELF EMPLOYED~~ ~~701161698~~

~~SPOUSE OCCUPATION:~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~9)~~ ~~JUROR: FRANCIS S HARTMANN~~ ~~JUROR NO: P-05-7 (80)~~

~~OCCUPATION: EXEC DIR UNIVERSITY LANDS~~ ~~701165901~~

~~SPOUSE OCCUPATION: BOOKKEEPER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~10)~~ ~~JUROR: CYNTHIA A BYER~~ ~~JUROR NO: P-05-7 (102)~~

~~OCCUPATION: MACHINIST~~ ~~701161752~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~11) JUROR: BILLY E STANFORD~~ ~~JUROR NO: P-05-7 (67)~~

~~OCCUPATION: SALES REP~~ ~~701173815~~

~~SPOUSE OCCUPATION: AUDITOR~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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12) JUROR: GREGORY BURNETT JUROR NO: P-05-7 (150)

OCCUPATION: SELF/MFG HOMES 701161650

SPOUSE OCCUPATION: SELF/MFG HOMES COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~13) JUROR: JOHN B ENGLISH~~ ~~JUROR NO: P-05-7 (200)~~

~~OCCUPATION: DRILLING CONSULTANT~~ ~~701163876~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~14) JUROR: SANDRA LYNN SNOW~~ ~~JUROR NO: P-05-7 (189)~~

~~OCCUPATION: BOOKKEEPER~~ ~~701173641~~

~~SPOUSE OCCUPATION: ENGINEER~~ ~~COUNTY: Andrews~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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15) JUROR: CASSANDRA SCOTT LYONS — JUROR NO: P-05-7 (170)

OCCUPATION: TEACHER MISD — 701165814

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

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16) JUROR: TAMMIE E STEPHENS — JUROR NO: P-05-7 (162)

OCCUPATION: MEDICAL TECHNOLOGIST — 701162541

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

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17) JUROR: BARBARA J MOORE — JUROR NO: P-05-7 (81)

OCCUPATION: HOSPITAL NUTRITION SERVIC — 701169816

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~18) JUROR: LEE A CATALANO~~ ~~JUROR NO: P-05-7 (94)~~

~~OCCUPATION: FILE CLERK~~ ~~701162163~~

~~SPOUSE OCCUPATION: ATTORNEY~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~19) JUROR: HEIDI L SCOTT~~ ~~JUROR NO: P-05-7 (174)~~

~~OCCUPATION: UNEMPLOYED~~ ~~701173083~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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20) JUROR: JERRY D HALLMARK JUROR NO: P-05-7 (107)

OCCUPATION: SALES 701165652

SPOUSE OCCUPATION: DIRECTOR COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~21) JUROR: RICHARD B IRWIN~~ ~~JUROR NO: P-05-7 (198)~~

~~OCCUPATION: POLICE OFFICER~~ ~~701166927~~

~~SPOUSE OCCUPATION: BOOKKEEPER~~ ~~COUNTY: Andrews~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~22) JUROR: ADRIAN G ZARATE~~ ~~JUROR NO: P-05-7 (92)~~

~~OCCUPATION: CASE MANAGER CORR CENTER~~ ~~701176227~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Martin~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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23) JUROR: JEFFREY D STEPHENS JUROR NO: P-05-7 (161)

OCCUPATION: ROUTE DRIVER 701173878

SPOUSE OCCUPATION: MANAGER COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

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24) JUROR: JENNIFER M BRAYTON JUROR NO: P-05-7 (101)

OCCUPATION: TEACHER MISD 701161689

SPOUSE OCCUPATION: ENGINEER COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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25) JUROR: SHARMAN K ADKINS JUROR NO: P-05-7 (66)

OCCUPATION: TEACHER ECISD 701159832

SPOUSE OCCUPATION: DIRECTOR CHARITY FOUND COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~26) JUROR: NEITA D COOPER JUROR NO: P-05-7 (151)~~

~~OCCUPATION: TEACHER 701162718~~

~~SPOUSE OCCUPATION: OILFIELD DISTRICT MGR COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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27) JUROR: ERICA SMITH JUROR NO: P-05-7 (72)

OCCUPATION: LEGAL ASSISTANT 701173509

SPOUSE OCCUPATION: NA COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~28) JUROR: PASCUAL URIAS~~ ~~JUROR NO: P-05-7 (149)~~

~~OCCUPATION:~~ ~~701174802~~

~~SPOUSE OCCUPATION:~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~29) JUROR: JAMES G JOLLY~~ ~~JUROR NO: P-05-7 (180)~~

~~OCCUPATION: GEOLOGIST~~ ~~701167224~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~30) JUROR: BILLIE J BROWN~~ ~~JUROR NO: P-05-7 (86)~~

~~OCCUPATION: RETIRED FOOD SERVICE~~ ~~701161413~~

~~SPOUSE OCCUPATION: RETIRED PHONE COMPANY~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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31) JUROR: ROGER D BULMAN JUROR NO: P-05-7 (97)

OCCUPATION: MANUFACTURING 701161596

SPOUSE OCCUPATION: SECRETARY COUNTY: Crane

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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32) JUROR: DAVID L SHUCK JUROR NO: P-05-7 (90)

OCCUPATION: RETIRED CHEMICAL ENGINEER 701173302

SPOUSE OCCUPATION: RETIRED COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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33) JUROR: MONICA GOMEZ JONES JUROR NO: P-05-7 (98)

OCCUPATION: CUSTOMER SERVICE REP 701167299

SPOUSE OCCUPATION: MISD HVAC DEPT COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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34) JUROR: VANESSA M PATTERSON JUROR NO: P-05-7 (73)

OCCUPATION: CASHIER 701170947

SPOUSE OCCUPATION: NA COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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35) JUROR: OFELIA B SANCHEZ — JUROR NO: P-05-7 (188)

OCCUPATION: COSMETOLOGIST — 701172876

SPOUSE OCCUPATION: STEEL WORKER REP — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~36) JUROR: PAULA B BYNUM — JUROR NO: P-05-7 (163)~~

~~OCCUPATION: PETSMART MANAGER — 701161758~~

~~SPOUSE OCCUPATION: NA — COUNTY: Midland [Cause]~~

~~SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___~~

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37) JUROR: LAURA J CARTER — JUROR NO: P-05-7 (147)

OCCUPATION: HOMEMAKER — 701162073

SPOUSE OCCUPATION: OWNER RETAIL FURNITURE — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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38) JUROR: PAUL M LOPEZ — JUROR NO: P-05-7 (199)

OCCUPATION: STUDENT — 701168313

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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39) JUROR: COURTNEY MULLINIX JUROR NO: P-05-7 (166)

OCCUPATION: SALES ASSOC

701170062

SPOUSE OCCUPATION: SINGLE

COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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40) JUROR: TOMMY E SMITH JUROR NO: P-05-7 (62)

OCCUPATION: MACHINIST

701173608

SPOUSE OCCUPATION: NA

COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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41) JUROR: PATRICIA E JONES JUROR NO: P-05-7 (154)

OCCUPATION: OFFICE COORDINATOR

701167302

SPOUSE OCCUPATION: RESPIRATORY THERAPIST

COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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42) JUROR: ROGER O CRAMER — JUROR NO: P-05-7 (179)

OCCUPATION: SALES REPRESENTATIVE — 701162889

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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43) JUROR: FERNANDO SANCHEZ — JUROR NO: P-05-7 (186)

OCCUPATION: MAINTENANCE — 701172840

SPOUSE OCCUPATION: STUDENT — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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44) JUROR: KRISTIN J PEREZ — JUROR NO: P-05-7 (176)

OCCUPATION: CLERK — 701173932

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO:
v.	§	MO:04-CR-67(,4)-RAJ
	§	
Jaime Duran Flores (4)	§	

GOVERNMENT'S
PEREMPTORY CHALLENGES

(Filed Jun. 7, 2004)

1	Maria Mondragon 6	4	Lee Catalano 18
2	Adrian Zarate 22	5	Cynthia Byer 10
3	James Jolly 29	6	Pascual Urias 28

ALTERNATE

1	Heidi Scott 19	2	

/s/ Jeff Pamar
Assistant U.S. Attorney

App. 37

FILED
JUN 07 2004
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

6-14-04
@ 8:30am

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO:
v.	§	MO:04-CR-67(4)-RAJ
	§	

Jaime Duran Flores (4)

JURY SEATING ARRANGEMENT

ALT #2 Monica Jones	12 Roger Bulman	11 Erica Smith	10 Sharman Adkins	9 Jennifer Brayton	8 Jeffrey Stephens	7 Jerry Hallmark
ALT #1 David Shuck	6 Barbara Moore	5 Tammie Stephens	4 Cassandra Lyons	3 Gregory Burnett	2 Christopher Mueller	1 Laura Long

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